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No. 04-952

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHOLLA READY MIX, INC.,

Petitioner,

v.

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; and ROBERT GASSER, Arizona Parks Department Compliance Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. A rule of the Arizona Department of Transportation prohibits it from buying materials for highway-construction projects if extracting those materials would adversely affect historically and culturally significant sites. Did the Department violate the Establishment Clause when it applied that rule to a materials site that has cultural and historic – as well as religious – significance?

2. Cholla alleged facts establishing that ADOT refused to purchase materials from Woodruff Butte because that site has cultural and historic – as well as religious – significance. Accepting the truth of those facts, did the Ninth Circuit properly affirm dismissal of the suit – or did it improperly impose a higher pleading standard – when it held that the Department's actions, as alleged, did not violate the Establishment Clause?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondents request the Court to deny Cholla Ready Mix, Inc.'s Petition for Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit.

This case concerns Cholla's challenge to the Arizona Department of Transportation's determination that in state highway-construction projects it would not use materials from Cholla's property, Woodruff Butte. ADOT's determination was based on its rule that prohibits it from using materials for construction projects if using them "will have major adverse impact on cultural or historic resources." (ADOT Standard Specifications for Road and Bridge Construction § 1001-4.01(c) [Pet. App. 40-42].) Cholla challenged that decision, claiming that Woodruff Butte's religious significance to the Hopi, Navajo, and Zuni Tribes tainted ADOT's decision not to participate in the butte's destruction, even though the site has historic and cultural significance apart from its religious significance to the Tribes.

The Ninth Circuit correctly rejected Cholla's challenge. Its opinion is consistent with this Court's Establishment Clause jurisprudence and is not inconsistent with any other authority that Cholla has cited.

In deciding whether to grant certiorari, the Court should note that, contrary to Cholla's repeated assertions (Pet. at i, 7, 8, 10, 18, 19), the rule does not bar Cholla – or any other property owner – from using its property as it sees fit. It applies only to ADOT, prohibiting it from

purchasing materials from sources when so doing would adversely affect historically or culturally significant sites.

STATEMENT OF THE CASE

An ADOT contract specification ("the rule") ensures that ADOT, in obtaining materials to build highways, will not participate in the destruction of cultural or historic sites: "If the Department determines that the proposed use will have major adverse impact on cultural or historic resources, the Department will not allow the use of the source." Pet. App. 40-41.

As noted in Cholla's First Amended Complaint, the Arizona State Historic Preservation Office (SHPO) found Woodruff Butte eligible for listing in the National Register of Historic Places for its historic, cultural, *and* religious significance. Pet. App. 66, ¶ 78. In a 1997 letter to Cholla, the SHPO stated:

> Woodruff Butte . . . was determined, by our office in 1990, to be eligible for the National Register of Historic Places as a Traditional Cultural Property important in the history, cultural and religious practices and beliefs of at least three Native American tribes. . . . The property was eligible . . . primarily because of its association with the migration and creation histories of the tribes . . . the cultural practices of the tribes . . . and the association with important deities in Hopi, Zuni and Navajo religion. The Butte is an important cultural landmark for the tribes and has been a place of extreme importance in medicinal plant collection and religious practices for centuries.

Id. (Cholla's emphases removed). The rule requires an applicant for an Arizona commercial-source number to obtain an environmental impact assessment certifying that use of the applicant's source will not have an adverse cultural or historic impact. Pet. App. 39-41. In compliance with the rule, Cholla retained an expert to prepare an environmental assessment. Pet. App. 65. He found that mining the butte would "adversely affect an historic property." *Id.* at 67, ¶ 80. Based on the expert's report, as well as consultation with the Tribes, ADOT rejected Cholla's application for a commercial-source number for the butte, finding that mining it would have an adverse impact on cultural and historic resources. Pet. App. 67, ¶ 83.

Cholla sued in the United States District Court, alleging that ADOT's actions violate the Establishment Clause because the rejection of Woodruff Butte was based "solely or at least primarily on the purported religious significance of Woodruff Butte." Pet. App. 67, ¶ 84. The district court dismissed Cholla's Amended Complaint. Pet. App. 16. The Ninth Circuit affirmed. Pet. App. 1 (reported at 382 F.3d 969 (9th Cir. 2004).)

THE COURT SHOULD DENY THE PETITION

Cholla urges this Court to grant certiorari for two reasons. First, it claims that ADOT violated the Establishment Clause by rejecting Cholla's application based "solely or at least primarily on the purported religious significance of Woodruff Butte." Pet. App. 67, ¶ 84. It contends that the court of appeals' opinion conflicts with Establishment Clause decisions from this Court and

other circuits. Pet. at 5-12. Second, it urges the Court to take the Ninth Circuit to task for supposedly having imposed a heightened pleading standard contrary to Civil Rule 8(a) and for supposedly having assumed facts not in the record. Pet. at 12-22. Neither argument is valid. The Ninth Circuit's opinion does not stray from established precedents, and the court did not hold Cholla to a heightened pleading standard or assume facts outside the record.

I. The Court of Appeals Correctly Ruled that Cholla Failed to State a Claim that ADOT Violated the Establishment Clause.

A. Cholla Fails to Show that the Court's Opinion Is Inconsistent with Applicable Precedents.

One of the factors that this Court considers in deciding whether to grant certiorari is whether the decision is "in conflict with the decision of another United States Court of Appeals on the same important matter." Sup. Ct. R. 10(a). Cholla asserts that the Ninth Circuit's opinion is inconsistent with decisions from this Court and other courts. Pet. at 6-9. But it does not prove that assertion. It cites no analogous case that reaches a different conclusion and cites no case that states a different rule of law. Simply put, it has not identified any conflict.

Cholla's arguments boil down to an assertion that the Ninth Circuit failed to properly apply Establishment Clause principles, especially the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This argument lacks merit, as the next subsection demonstrates. But even if it were true, it would not make this case appropriate for this Court's review because "[a] petition for writ of certiorari is rarely

granted when the asserted error consists of the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

B. The Court Properly Applied the *Lemon* Test.

Lemon held that a government action passes muster under the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing religion, and (3) does not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13.

1. ADOT had a secular purpose in adopting the rule and applying it to Woodruff Butte.

The Ninth Circuit held that, aside from any incidental impact on religion, ADOT's adopting the rule and applying it to Woodruff Butte had the obvious secular purpose of protecting historic and cultural resources:

> It is clear from Cholla's complaint that defendants' actions have the secular purpose of carrying out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation as a whole.
>
> . . . Cholla has alleged no facts that would support a conclusion that the state defendants were not motivated at least in part by this secular purpose.

Pet. App. 9. The SHPO found Woodruff Butte eligible for inclusion on the National Register not only because of its religious significance, but also because of its association with the Tribes' migration and creation histories, cultural practices, and medicinal-plant collection. Pet. App. 66,

¶ 78. Although Cholla asserts that the opinion is inconsistent with precedent, it points to no case that reaches a contrary conclusion.

Unable to attack the rule's unmistakably secular purpose, Cholla argues that a *secondary* rationale of the Ninth Circuit – accommodation of religion – cannot properly justify the rule under the secular-purpose prong. Pet. at 6. But in so doing, it misrepresents the Ninth Circuit's holding. The court reached its main conclusion – that the rule had the obvious secular purpose of protecting historic and cultural resources – without referring to accommodation. Pet. App. 9. And Cholla's argument on this point is misleading. It argues that "the Ninth Circuit cites no legal precedent holding that a 'secular purpose' is served when governments bar people from using their private property 'to accommodate' (or to avoid interference with) religious groups." Pet. at 7. But the rule does not prevent Cholla from using its property; it operates only on ADOT, preventing it from buying materials extracted from historically and culturally important sites and thereby keeping ADOT from participating in their destruction. *Cf. Harris v. McRae*, 448 U.S. 297, 319 (1980) (statute does not violate the Establishment Clause merely because it coincides or harmonizes with the tenets of some or all religions).

2. The primary effect of applying the rule to Woodruff Butte was not the advancement of religion.

The second inquiry is whether the primary effect of ADOT's actions was to advance religion. *Lemon*, 403 U.S. at 612. As the Ninth Circuit recognized, the rule's primary effect is not to advance religion; rather, it is to prevent ADOT from using materials in state construction projects

if doing so will contribute to the destruction of historic or cultural sites. Pet. App. 11. Moreover, a given site's religious significance does not eliminate its historic or cultural importance, a point the court demonstrated by referring to numerous locations around the world that are historic but have (or at one time had) religious connotations. Pet. App. 10-11. A prime example is the Parthenon, which unquestionably has historic value but was also a temple of worship for the Greeks. *Id.* at 10. The court also noted several other Judeo-Christian religious sites that are listed on the National Register. *Id.* As the Ninth Circuit held:

> The complaint's descriptions of the controversy and litigation over the land; the cultural and historic importance of Woodruff Butte in addition to its religious significance; and the Arizona State Historic Preservation Officer's conclusion that the Butte is an 'important cultural landmark' are inconsistent with Cholla's claim that advancing religion is the principal or primary effect of Defendants' actions.

Id. at 10. States can protect sites with historic and cultural – as well as religious – significance without being guilty of advancing religion in violation of the Establishment Clause.

Cholla argues that the Ninth Circuit ignored the importance of governmental neutrality in religion cases. Pet. at 7-8. This ignores a central holding in the court's opinion: the rule does not constitute an endorsement of the Tribes' religions: "There is no suggestion that the state defendants favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups." Pet. App. 11. Cholla

does not, cannot, point to anything in the record to the contrary.

This case is distinguishable from others that consider whether the display of religious symbols amounted to governmental endorsement of religion. *See Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984). ADOT erected no monument to any religion or to religion in general. It simply decided not to purchase materials from a source because extracting those materials would contribute to the destruction of a historic or cultural site. Thus, unlike *Allegheny County* and *Lynch*, there is no government-sponsored public display at issue. ADOT's actions cannot be seen as endorsing one or more of the Tribes' religions under the analyses in *Allegheny County* and *Lynch*.

3. Applying the rule to Woodruff Butte did not excessively entangle ADOT with religion.

As the Ninth Circuit acknowledged, some level of interaction between government and religious communities is inevitable; entanglement must be excessive to violate the Establishment Clause. Pet. App. 12 (citing *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). This Court looks to the character and purpose of the institutions benefited and the nature of the interaction. *See Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988).

The Ninth Circuit held that ADOT's one-time consultation with the Tribe in evaluating Cholla's application for a commercial-source number did not constitute excessive entanglement. Pet. App. 12. Insisting that this one-time

consultation constitutes excessive entanglement, Cholla contends that the Ninth Circuit erred in holding that ADOT had only "routine administrative contact" with the Hopi Tribe that did not amount to excessive entanglement. Pet. at 8, 12 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988), and *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980)). Neither *Lyng* nor *Badoni* supports Cholla's assertion. *Lyng* involved the Free Exercise Clause; it did not discuss the Establishment Clause at all, much less the *Lemon* test's excessive-entanglement prong. 448 U.S. at 447-53. Although *Badoni* was an Establishment Clause case, its facts are nothing like this case. It concerned a request to exclude tourists from a national monument in order to aid the performance of religious ceremonies, and it held that granting such a request would violate the Establishment Clause. 638 F.2d at 179. The facts here are quite different. Unlike *Badoni* – where the requested injunction would have required the government to bar the public from public land to advance religious concerns – ADOT's rule does not require Cholla to allow the Tribes to use Woodruff Butte property for religious purposes, or for any purpose at all. It does not coerce Cholla's conduct at all. It applies only to ADOT – limiting its purchase of materials – and does so in a content-neutral, generally applicable manner.

Moreover, deciding whether Woodruff Butte has historic or cultural significance happened exactly once, without repeated or ongoing contact with the Tribes. And even if extensive and ongoing contacts had occurred, they would not have implicated the Establishment Clause. The Tribes are semi-autonomous governments, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), not merely religious organizations. The Establishment Clause

does not forbid state governments from interacting with tribal governments.

Finally, specifically removing religious factors from the mix, as Cholla demanded, could have been seen as being antagonistic to religion. And as Cholla acknowledges and argues, the First Amendment demands governmental neutrality. Pet. at 7 (citing *Bd. of Educ. v. Grumet*, 512 U.S. 687, 697 (1994)).

C. Cholla's Attack on the *Lemon* Test Is Misplaced.

Cholla also argues that the *Lemon* test might not apply in this case. Pet. at 15-16. This argument lacks merit. First, Cholla specifically based its challenge to the rule on the *Lemon* test. The First Amended Complaint attacks the rule on each of the three *Lemon* factors. Pet. App. 68-69, ¶¶ 91-94. Second, Cholla has not proposed any alternative test to replace *Lemon*, much less one under which its pleading could have stated a claim. Third, the cases Cholla cites each presented specific reasons why the *Lemon* test did not apply. *See Marsh v. Chambers*, 463 U.S. 783, 788-89 (1983) (refusing to invalidate a daily legislative prayer in reliance on direct historical evidence of the Framers' contrary intent); *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (invalidating graduation prayers at public schools, relying on *Engel v. Vitale*, 370 U.S. 421 (1962), a pre-*Lemon* case that clearly prohibited prayers in public schools); *Larson v. Valente*, 456 U.S. 228, 246, 252 (1982) (invalidating a statute that imposed registration and reporting requirements on certain religious organizations but not others and noting that *Lemon* does not apply to laws that discriminate among religions). Each of these

cases involved specific circumstances that controlled the decisions without reference to *Lemon*. Those circumstances do not exist in this case, and Cholla offers no reason to depart from *Lemon* here.[1]

D. The Rule Is Not Analogous to the Display of a Religious Symbol at a Public Building.

Cholla claims that the Ninth Circuit erred by not applying the analysis applicable when a religious symbol appears in a challenged government-sponsored display that contains historical or cultural features. Pet. at 9-12. But this case does not involve a government-sponsored display containing religious symbols. ADOT's decision not to participate in damaging a historic location did not endorse any religion – or religion generally.

These differences negate Cholla's attempt to tie this case to two cases involving governmental display of religious symbols that are now before this Court: *Van Orden v. Petty*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004), and *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004). Pet. at 11-12. (The Court heard arguments on these cases on March 2, 2005.) Because ADOT is

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[1] One of the issues in *McCreary County v. ACLU of Kentucky* is: "Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence." *McCreary County v. ACLU of Ky.*, No. 03-1693, docket, http://www.supremecourtus.gov/qp/03-01693qp.pdf. Thus, the Court need not take this case to decide whether to reject *Lemon*. And there is no reason to hold this case pending the decision in *McCreary County*, because Cholla has not offered any alternative test or shown how a different test would change the outcome.

not involved in any display with respect to Woodruff Butte, these cases are irrelevant.

II. The Court of Appeals Did Not Impose a Heightened Pleading Standard or Rely on Facts Outside the Record.

Cholla argues that the Ninth Circuit improperly dismissed the First Amended Complaint for failure to allege a prima-facie case. Pet. at 12-19. In conjunction with this argument, it asserts that the court failed to credit its allegations of fact and assumed facts that were not in the record. *Id.* at 19-22. Neither argument has merit, as the following subsections demonstrate.

A. Even if the Ninth Circuit Were Guilty of Cholla's Charges, This Case Would Not Be Worthy of Certiorari.

Even if Cholla's assertions had merit, this would not make certiorari appropriate here. Cholla argues merely that the Ninth Circuit misapplied well-established law. The Ninth Circuit did not announce that it was rejecting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), in cases involving the Establishment Clause. Nor did it state that it would not follow the traditional rules in evaluating motions to dismiss in such cases. An argument that the court of appeals merely erred in applying the law does not normally make a case worthy of certiorari. Sup. Ct. R. 10.

B. The Ninth Circuit Did Not Impose a Heightened Pleading Standard.

Cholla argues that in rejecting its claim, the Ninth Circuit imposed a heightened pleading standard. Pet. at 16-17. It did not.

Courts may not require plaintiffs to go beyond the pleading requirements of Civil Rule 8(a) and allege in their complaints sufficient facts to establish a prima-facie case. *See Swierkiewicz*, 534 U.S. at 511 ("This Court has never indicated that the requirements for establishing a prima facie case . . . also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."). But the Ninth Circuit did not do so here. The court did not affirm the dismissal because there were facts missing from the First Amended Complaint that would have been necessary to establish a prima-facie case. Instead, it analyzed the facts that Cholla alleged in the First Amended Complaint and concluded as a matter of law that Cholla had not stated a claim under the Establishment Clause. Pet. App. 8-13. If courts could not evaluate the facts as alleged by the plaintiff – as the lower courts did here – then dismissals for failure to state a claim would become a thing of the past.

C. The Ninth Circuit Did Not Improperly Discredit Cholla's Allegations or Go Outside the Record.

The whole basis for Cholla's argument that the Ninth Circuit went outside the record is mistaken. The gist of this argument is that the Ninth Circuit ignored Cholla's allegation "that the sole reason for" ADOT's decision not to purchase materials extracted from Woodruff Butte "was

that Cholla's land is sacred to the Tribes." Pet. at 20 (citing Pet. App. 68.) It asserts that the Ninth Circuit's contrary conclusion – that ADOT had a secular purpose for its decision – is outside the confines of the pleading, having been "based on what Respondents argued in their Motion to Dismiss." *Id.* This argument ignores an important part of Cholla's own pleading.

The First Amended Complaint itself established that Woodruff Butte's historic and cultural importance goes beyond its religious significance to the Tribes. That pleading quoted the SHPO's finding that the butte's prominence derives from several sources. In a 1997 letter to Cholla, the SHPO stated that the butte was eligible for listing with the National Register of Historic Places

> as a Traditional Cultural Property important in the history, cultural and religious practices and beliefs of at least three Native American tribes. . . . The property was eligible . . . primarily because of its association with the migration and creation histories of the tribes . . . the cultural practices of the tribes . . . and the association with important deities in Hopi, Zuni and Navajo religion. The Butte is an important cultural landmark for the tribes and has been a place of extreme importance in medicinal plant collection and religious practices for centuries.

Pet. App. 66, ¶ 78 (Cholla's emphases removed). The Ninth Circuit properly considered the SHPO's finding because it was a factual allegation contained in the pleading. *See Oakley v. Louisville & Nashville R. Co.*, 338 U.S. 278, 280 (1949) (the Court analyzes a motion to dismiss based on the facts pleaded in the complaint). Thus, the SHPO finding – which Cholla set forth in the First Amended

Complaint – clearly contradicts Cholla's allegation that ADOT decided not to participate in destroying Woodruff Butte solely on religious grounds. Pet. App. 67-69. The Ninth Circuit properly rejected this inconsistent allegation: a court is not bound by legal conclusions cast as factual allegations. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). It was not required to accept allegations as true if they were merely conclusory, unwarranted deductions of fact, or unreasonable inferences contradicted by the facts alleged. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). In sum, the record fully supported the Ninth Circuit's decision.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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